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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 387

DOROTHY CASEY, as Administratrix of the Estate of JAMES J. CASEY, deceased,

Petitioner,

v.

AMERICAN EXPORT LINES, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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Opinions Below

The opinion of the District Court (R. 558-559) is reported at 1948 A. M. C. 978. The memorandum decision of the Trial Judge (R. 551) is not reported. The first opinion of the Court of Appeals for the Second Circuit (R. 570) is reported at 173 F. 2d 324, 1949 A. M. C. 417. Its opinion on rehearing (R. 612-613) is reported at 176 F. 2d 337, 1949 A. M. C. 1510.

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit was entered July 15, 1949 (R. 613). The petition for writ of certiorari was filed October 12, 1949. The jurisdiction of this Court is invoked under 28 U. S. Code 1254(1).

Questions Presented

Petitioner seeks to present the following two questions:

1. Is the liability of respondent, a general agent of the United States, for the negligence of its shoreside employee governed by state or by federal maritime law when such negligence results in the death of a government employed seaman in the course of his duties aboard a vessel operated by the United States?

2. Does a United States District Court, in the absence of diversity of citizenship, have jurisdiction of a civil action against respondent for the wrongful death of such a seaman on board a vessel in navigable waters of the United States?

Statement

Respondent, American Export Lines, Inc., was a ship's husband or General Agent appointed by the United States under the standard form of agreement to manage the accounting and other shoreside business of the SS. *Morris Sigman* and other vessels operated by the United States through the War Shipping Administration (R. 303).[1]

[1] War Shipping Administration Form GAA 4-4-42, 7 Fed. Reg. 7561-7562, 46 C. F. R. 1943 Cum. Supp., p. 11427, sec. 306.44.

Petitioner's decedent met his death on January 13, 1945, while serving as Master on board the SS. *Morris Sigman* then moored in the port of Boston, Massachusetts.[2]

Petitioner commenced an action at law in the United States District Court for the Southern District of New York. The complaint alleged that she had been duly appointed administratrix of the estate of the decedent by the Surrogate of the County of Queens, State of New York, and that respondent was a corporation organized and existing under and by virtue of the laws of the State of New York with its principal place of business in the Borough of Manhattan, City and State of New York (R. 4). It specifically averred that the action was brought pursuant to 46 U. S. Code 688, commonly known as the Jones Act, and the various statutes governing actions for wrongful death (R. 6). It alleged that respondent "was the charteree and/or the agent of the SS. *Morris Sigman* and operated, managed and controlled said vessel", and that petitioner's intestate "was in the employ of defendant [respondent] on board the aforementioned vessel, having prior thereto signed regular shipping articles to serve thereon in the capacity of Master"; that on or about January 13, 1945, at 4 o'clock in the morning, while petitioner's intestate was on board the *Morris Sigman* in the course of his employment, a fire broke out, as a consequence of which petitioner's intestate suffered injuries resulting in his death (R. 5).

The complaint specified that the injuries resulting in the death of petitioner's intestate were caused by the negligence of respondent, its agents, servants and employees in (a) failing to provide proper and adequate fire fighting equipment, (b) failing to maintain and keep proper and

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[2] Employment on a government owned vessel operated by the War Shipping Administration as successor to the Maritime Commission made petitioner an unclassified civil service employee of the United States. Civil Service Rules, Schedule A, sec. xxi (1), Executive Order No. 9004, 7 F. R. 2; Executive Order No. 9247, 7 F. R. 837; 5 C. F. R., 1943 Cum. Supp. p. 1488, sec. 50.21.

adequate fire watches and fire protection, (c) failing promptly to discover the fire, (d) failing to take prompt action to extinguish the fire, (e) failing to take prompt action to rescue and save petitioner's intestate, and (f) failing to inspect the vessel's appliances, materials and equipment to determine the existence of any unsafe and unseaworthy conditions (R. 5).

Respondent's answer (R. 8-9) admitted that it was a New York corporation and that a fire broke out on the vessel while petitioner's intestate was on board in the course of his employment and duties. It denied that respondent operated, managed and controlled the vessel, denied that petitioner's intestate was in respondent's employ, denied all allegations of negligence and unseaworthiness and alleged that respondent acted only as General Agent of the United States pursuant to the terms of an agreement in writing.

The trial commenced December 2, 1947, resulting in a judgment on the verdict in favor of petitioner, entered December 17, 1947. The testimony showed that in addition to the ship's company, all of whom had signed articles with the Master as representative of the War Shipping Administration as operating owners of the *Morris Sigman* on the voyage, there were also aboard two watchmen who, although employed by respondent, were under the exclusive direction and control not of respondent, but of the United States, acting through the master and officers of the vessel (R. 105, especially f. 315) in accordance with the Coast Guard Regulations for the Security of Vessels in Port (33 C. F. R., Sec. 6.380).

At the close of the trial, the District Court denied respondent's motion to dismiss (R. 504). Three issues of negligence were submitted to the jury by the court's charge (R. 529).

1. That the defendant [respondent] failed to maintain and keep proper and adequate fire watches;

2. That the defendant [respondent] failed to discover promptly the fire on the vessel, and

3. That the defendant [respondent] failed to take prompt action to extinguish the fire.

As to the first charge concerning the fire watches, the court explained that "The principal basis of this charge is * * * that the defendant [respondent] did not comply with the Coast Guard Regulations with respect to sea watches" (R. 532-533). This included not only whether or not the watchmen patrolled their post, but also whether the ship's officer should have actually been on active patrol during his watch and whether there was an engineer actively on watch (R. 533). Similarly, as to the second charge regarding the failure promptly to discover the fire, the court stated it concerned primarily the thoroughness, or lack of thoroughness of the work of the two shore watchmen, but "also it concerns, to some extent, the action of the other persons on watch at the time" (R. 534). Finally, as to the third charge, failure to take prompt action to extinguish the fire, the court said it dealt with the condition of the ship's fire hose and the promptness with which water pressure was delivered by the fire pumps (R. 534). The court made no suggestion that either of these two items involved the watchmen for they were exclusively under the control and operation of members of the crew.

The District Court ruled that the case was governed by the decision of this Court in *Hust* v. *Moore-McCormack Lines*, 328 U. S. 707, despite the fact that injury which resulted in the death of the deceased occurred subsequent to the effective date of the Clarification Act, March 24, 1943 (R. 551). Consequently, the issues of liability were treated as being whether the agents, servants and employees of the owner and operator of the SS. *Morris Sigman*, were negligent in connection with the death of petitioner's decedent and, if so, as requiring a verdict against respondent, the General Agent. Following the

entry of judgment in favor of petitioner, judgment was reduced by striking therefrom the provision as to interest from the date of death (R. 560) and also by the sum of $5,500, representing payment already made to petitioner by virtue of war risk insurance (R. 561). On appeal the United States Court of Appeals for the Second Circuit first affirmed (R. 570), but withheld mandate pending decision by the United States Supreme Court in the case of *Cosmopolitan Shipping Co.* v. *McAllister,* 337 U. S. 783. When that decision overruled the *Hust* case, the Court of Appeals reversed the judgment of the District Court and remanded the matter for further proceedings, leaving open the question of jurisdiction of the cause "as one arising under the law of Massachusetts despite the lack of diversity of citizenship of the parties" (R. 612).

The record is thus entirely barren of any submission to the jury of any question of respondent's own negligence. The sole question presented to the jury was the negligence of the United States, operator of the SS. *Morris Sigman* and it was assumed, following *Hust* v. *Moore-McCormack Lines, supra,* that any negligence chargeable to the operating owner would equally make respondent liable.[3]

Argument

Petitioner's intestate, a civil service employee of the United States, serving as shipmaster of a government operated vessel, met his death aboard his vessel in Boston Harbor. Petitioner recovered a judgment in the District Court under the Jones Act (46 U. S. Code 688). The court below reversed in reliance upon *Cosmopolitan Shipping Co.* v. *McAllister,* 337 U. S. 783, but remanded the cause

[3] Petitioner's suggestions (Pet. 2, 10, 11, 15) that the question of the negligence of respondent's shoreside employees was raised on the record is contrary to fact. The only question raised was the liability of the operating owner of a vessel under the Jones Act (46 U. S. Code 688), which was assumed in accordance with the *Hust* case, to involve the liability of respondent.

for further proceedings under Massachusetts law, provided the District Court should determine it had jurisdiction in the absence of diversity of citizenship. Petitioner apparently asks that this Court grant certiorari and instruct the District Court (a) that the applicable law is the federal maritime law incorporating the wrongful death statute of the state to which the vessel belongs, rather than Massachusetts, the state where the death occurred, and (b) that the case being one governed by federal maritime law, the case arises under the Constitution, laws and treaties of the United States and falls within the jurisdiction conferred by 28 U. S. Code 1331. We submit that in the present posture of the case petitioner's demand in effect is but a request for an advisory opinion by this Court and does not merit the granting of the writ.

1. *The questions sought to be presented are not raised by the record.* Conceding arguendo the importance of the questions for which petitioner seeks review and the existence of a conflict concerning them, it does not follow that they require or even permit resolution on the record now at bar. On the contrary, the record shows that there has been no determination of the controlling facts necessary to found liability of respondent and that what petitioner really seeks is little more than an advisory opinion (cf. Pet. 18-19).

The evidence in the record might permit a finding of negligence of either the vessel personnel employed by the United States, of the watchmen employed by respondent, or of both (see opinion below, R. 573). The charge of the trial judge authorized the jury to return a verdict against respondent if they found negligence of *either* the vessel's personnel or of the watchmen (R. 532-534). It is impossible, therefore, to know which employee group or groups the jury found to be negligent, yet it is now settled by *Cosmopolitan Shipping Co.* v. *McAllister, supra*, that if the negligence were solely that of the vessel's personnel, respondent is not liable for it is not their principal. Absent

a finding that others than members of the crew were negligent, respondent cannot be held liable under any law or in any court.

But even if it were established that negligence of the watchmen employed by respondent contributed to Casey's death, it would not follow that respondent must be liable for their negligence. No matter what the applicable law, be it the common law of Massachusetts or the federal maritime law, the record (cf. esp. R. 105) together with the applicable Coast Guard Regulations for the Security of Vessels in Port (33 C. F. R., Sec. 6.380), indisputably establishes that the watchmen were under the exclusive supervision and control of the mate, representing the United States as operating owner of the vessel, and respondent had no authority or control over them in respect of the acts in the course of which their alleged negligence occurred. It follows that such negligence, if any there was, falls within the loaned servant rule, and only the United States, who exercised control over the watchmen, and not respondent, who was only their general employer, is liable therefor. *Standard Oil Company* v. *Anderson,* 212 U. S. 215; *Denton* v. *Yazoo and Mississippi Valley R. R. Co.,* 284 U. S. 305.

2. *The case involves no question of conflict or of general importance.* The decision of the court below remanding this matter to the District Court without deciding the question of jurisdiction cannot be in conflict with the decision of any other Court of Appeals in the same matter, nor has it decided an important federal question, nor departed from the accepted and usual court and judicial proceedings so as to call for an exercise of this Court's power of supervision. All that has been done is to remit petitioner to the District Court there to determine whether absent diversity of citizenship there is jurisdiction of a cause of action founded on the Massachusetts death statute and if so to adjudicate it.

So far as concerns the law to be appealed, the applicability of the Massachusetts Wrongful Death Act to a death on navigable waters of the United States within the territorial limits of Massachusetts is settled beyond question by decisions of this Court. In *Just* v. *Chambers*, 312 U. S. 383, a unanimous court has but recently held that the death of a shipowner did not terminate a right of action for personal injuries against him and confirmed the applicability of the local death statute. The court applied the Florida survival statute since the accident occurred in Florida territorial waters. The court first referred to the well known proposition that state wrongful death statutes create a right in admiralty, citing *The Hamilton*, 207 U. S. 398, and *Western Fuel Co.* v. *Garcia*, 257 U. S. 233-242. It continued (312 U. S. at 388):

> "And this Court, upon an elaborate review of the decisions, concluded that no suit for wrongful death would lie 'in the courts of the United States under the general maritime law'."

The court then summarized the settled law (at p. 391):

> "The admiralty rule in the case of wrongful death can be stated either negatively or positively, and the result does not turn on the mere mode of expression. The pith of the matter is that the maritime law, as we conceived it, did not permit recovery, and in the same sense, in substance, the maritime law denied the survival of causes of action against a deceased tort feasor. The maritime law would be supplemented or modified by state legislation in the one case as truly as in the other, and either supplement or modification is permissible in accordance with the accepted criterion."

See also, *American Stevedores, Inc.* v. *Porello*, 330 U. S. 446, 460; *Spencer Kellogg Co.* v. *Hicks*, 285 U. S. 502, where the New York Decedent's Estate Law was applied in actions for wrongful death of persons killed in territorial waters of the State of New York.

So far as the question of jurisdiction in the absence of diversity is concerned, petitioner can cite only the case of *Seas Shipping Company* v. *Sieracki*, 328 U. S. 85. There, the District Court sitting at law without a jury entertained jurisdiction between residents of the same state. But, the jurisdictional point was nowhere raised on the record, and petitioner concedes there was no jury (Pet. 14). For all practical purposes under the practice now followed by the District Courts, it would have been surplusage to raise the question of jurisdiction in *Sieracki* because the matter would have merely been transferred to the admiralty side of the same court where the court sitting without a jury would have jurisdiction since the accident occurred on navigable waters. No case is cited by petitioner where the admiralty and maritime jurisdiction granted by 28 U. S. Code 1333(1), former 28 U. S. C. 41(3), has been held to sustain jurisdiction of the District Courts at law in the absence of other jurisdictional requirements. In the case at bar the complaint does not involve the admiralty or maritime jurisdiction of the United States, but jurisdiction under 46 U. S. Code 688, the Jones Act (R. 6). And obviously, petitioner at the trial proceeded under the Jones Act alone.

Moreover, authorities involving personal injuries, for which a remedy was furnished under the federal maritime law, are not in point as to the question involving a cause of action for wrongful death for which no remedy was furnished historically by the general maritime law. The remedy for death was the creature of the wrongful death statute of whatever state wherein the death occurred. Where death occurred on the high seas, then the wrongful death statute of the state to which the vessel belonged, or subsequent to its adoption, the Death on the High Seas Act (46 U. S. Code 761) was applied. *The Hamilton, supra.*

3. *Petitioner has an adequate remedy without recourse to this Court.* For yet another reason, the facts of this case do not justify review by this Court. In addition to

her suit against respondent, petitioner has pending a second suit under the Jones Act, timely filed against the United States as operating owner in possession of the vessel and employer of its master and crew. In that suit petitioner may recover on proof of negligence without regard to any of the disputed questions of applicable law and existence of federal jurisdiction which she now seeks to raise in this Court. The existence of such a pending suit further confirms that what petitioner is asking here is in fact only an advisory opinion as to the law and jurisdiction for the guidance of other litigants in other cases (see Pet. 18-19), not for the disposition of the present case.

CONCLUSION

The decision below is correct and there is no conflict. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted,

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